IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

No. 72-1180

OLD DOMINION BRANCH NO. 496,
NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,
AFL-CIO, Appellants,

v.

# RESPONSE AND MOTION OF HENRY M. AUSTIN, L.D. BROWN, AND ROY P. ZIEGENGEIST TO DISMISS APPEAL OF OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, FROM A JUDGMENT OF SUPREME COURT OF VIRGINIA

This brief is filed on behalf of Henry M. Austin, L.D. Brown and Roy P. Ziegengeist, in support of motion to dismiss the appeal, as provided in Rule 16, of the Rules of this Court.

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## *AUTHORITIES CITED*

## *QUESTIONS PRESENTED ON APPEAL*

1. **APPELLANTS ASSERT THE STATUTE (Virginia Code 8-630) AS AUTHORITATIVELY CONSTRUED IS UNCONSTITUTIONALLY OVERBOARD AND VAGUE.**

**(a) Overbreadth.**

The Appellants in contending that the Virginia Statute is unconstitutional for overbreadth rely upon *Gooding vs. Wilson*, 405 U.S. 518 (1972) wherein a Criminal Statute of the State of Georgia was held unconstitutional. This decision by a divided Court with two members not participating, turns upon the construction placed upon the Statute by the Georgia Courts and upon the Criminal aspect of the statute involved. The Supreme Court of Virginia has held that a civil action brought under Code Section 8-630, the insulting words statute, is one for libel and slander and the common law rules for slander are to be applied even though the language used is defamatory on its face. *M. Rosenberg & Sons vs. Craft*, 182 Va. 512; 528; 29 S.E. (2nd) 375, 382-83 (1944), *Carwile vs. Richmond Newspapers, Inc.*;196 Va. 1, 6, 82 S.E. 2nd 588, 591 (1954) *Shupe vs. Rose's Stores Inc.* 213 Va. 374. The gist of an action under the Virginia Statute of Insulting Words is the insult to the feelings of the offended party, *Cook vs. Patterson Drug Co.* 185 Va. 516, and the insult is the basis for the action; *Brooks va. Calloway;* 12 Leigh (39 Va) 466. The criminal statute in the *Gooding* case was held unconstitutional as being vague and overbroad because it had not been narrowed by Georgia Appellate Courts to apply only to fighting words which by their very utterance– "tend to incite an immediate breach of peace."

The Virginia Statute of Insulting Words as do similar statutes in most of the states, exist independent of any labor dispute. The constitutionality of such statutes has been accepted by the Courts over the years. See "Corpus Juris Secundum Constitutional Law," Vol. 16, 213 (2) citing in support of the general rule that defamatory utterances are not within the area of constitutionally protected speech and writing: *Roth vs. U.S.*; 77 Sp.Ct. 1304; 354 U.S. 476; 1 L Ed. 2nd 1498, rehearing denied 78 Sp.Ct. 8; 355 U.S. 852,

*New York Times Co. vs. Sullivan* 84 Sp.Ct. 710; 376 U.S. 254. *Linn vs. Plant Guard Workers of Am. Local 114;* 86 Sp.Ct. 667; 383 U.S. 53.

The difficulty of defining libel has often been referred to and it has been said that attempts to define libel although practically innumerable have never been so comprehensive and accurate as to comprehend all cases that may arise. "Corpus Juris Secundum Libel and Slander, Vol. 53, Sec. 1." In the interpretation of words "slanderous" under the Virginia Statute of Insulting Words the Common Law rules for slander are to be applied. The foundation of such actions for defamation is the injury done to reputation; that is injury to character of an individual whereas in *Gooding* the foundation upon which criminal action was based was fighting words which tend to incite an immediate breach of peace and the failure to define these words resulted in the statute being declared unconstitutional.

(b) Vagueness

In addition to overbreadth it is contended that the Virginia Statute of Insulting Words Virginia Code 8-630 is also void for vagueness. In *Coates vs. Cincinnati;* 402 U.S. 611 relied upon by Appellants, the use of word "Annoy" in connection with a criminal offense making it unlawful to assemble on the sidewalks in a manner annoying to people was vague because it subjected right of assembly to an unascertainable standard of conduct; for what may be annoying to one person may not be annoying to others. The value protected by libel laws are (1) the desire of the individual to preserve a certain privacy around his personality from unwarranted intrusions and (2) a desire to preserve his public good name; *Rosenbloom vs. Metromedia;* 403 U.S. 29. It has been held that society has a strong interest in preventing and redressing attacks on reputation. *Rosenblatt vs. Baer;* 383 U.S. 75, 87.

The injury in libel and slander is to the feeling and reputation of the individual. In *Rosenblatt vs. Baer;* 383 U.S. 75, 93, Justice Stewart in note on page 93, refers to the following:

> "Civil actions for slander and libel developed in early ages as a substitute for the duel and a deterrent to murder. They live within the genuine orbit of the common law, and in the distribution of American Sovereignty they fall exclusively within the jurisdiction of the states."

The Statute asserted to be unconstitutional for vagueness as interpreted is but an extension of the common law which is within the jurisdiction of the State.

The objection as to vagueness of this statute and of overbreadth are not applicable under the construction and limitations of the Supreme Court of Appeals of Virginia.

2. APPELLANTS ASSERT THE STATUTE AS APPLIED IS UNCONSTITUTIONAL BECAUSE THE PUBLICATION PENALIZED THEREUNDER IS PROTECTED BY THE FIRST AMENDMENT.

It is the contention that dissemination of facts of a labor dispute must be regarded in the area of free discussion and that identity of the Appellees as non members comes within such information. Had the Appellants gone no further than disseminate such information, no suit for libel would be involved. However, the Appellants went far beyond identifying the Appellees as non members; for they maliciously published of and concerning the Appellees that they were traitors and men of such low character and rotten principles that they should be despised by their fellow workers. This Court in *Linn vs. United Plant Guard Workers,* 383 U.S. 53; 86 Sp.Ct. 657; 15 L Ed 2nd 583 (1966) stated:

> "We conclude that where either party to a labor dispute circulates false and defamatory statements during a Union organizing campaign the Court does have jurisdiction to apply state remedies, if complainant pleads and proves that the statements were made with malice and injured him."

It is said by Appellants that the fact the Appellees were non members of Union was a matter of general interest so

as to give Union protection under *New York Times vs. Sullivan*; 376 U.S. 259.

The Appellees had a right under the Virginia "Right To Work Law" Code Section 40.1-58 to 40.1-69 to decide for themselves whether they would join the Union. Appellees were not "public officials" nor "public figures" and whether they did or did not join Union did not present an issue of public or general concern. Hence *New York Times and Rosenbloom* are not applicable.

Appellants say the words used were nothing more than mere rhetorical hyperbole and that no one would have taken same other then as such. To accuse one of having "rotten principles" of "lacking character" of "treason" is beyond rhetorical hyperbole and would be understood as being libelous and it was so understood by the jury under appropriate instructions. It is the very type of maliciousness that was contemplated in the *Linn* case and for which Union must be answerable. The very fact Union asserts that the statements were published to exert pressure on Appellees to compel them to join Union by holding them up to ridicule before their fellow workers indicates not only the malice involved but also the deliberate intent to slander Appellees.

Appellants complain that the judgment if allowed to stand will have a far reaching impact on the labor movement. This Court however in *Linn* laid down the ground rules to govern the conduct of Union stating at page 83:

> "But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned and Unions should adopt procedures calculated to prevent such abuse."

What Union did in this instance was done deliberately with a calculated purpose of doing exactly what this Court said Union could not do; that is engage in the malicious utterance of defamatory statements intended to hurt and harm Appellees to compel them to join Union.

Union's contention in the final analysis is basically a disagreement with the *Linn* decision. In essence Union asks that *Linn* be overruled.

## 3. APPELLANTS ASSERT HOLDING THE DEFAMATION ACTIONABLE UNDER THE VIRGINIA STATUTE OVERSTEPPED THE LIMITS IMPOSED BY FEDERAL LABOR LAW.

The Appellants contend that the Court misinterpreted *Linn's* reference to defamatory statements made with malice. Contrary to Appellants assertion *Linn* does say that the malicious publication of defamatory statements does not of itself constitute an unfair labor practice. The NLRB is concerned with the effect upon a representative election, while state remedies are designed to compensate the victim. *New York Times* was prior to *Linn* and in laying down the guide lines in *Linn* the Court did so with awareness of what it had said.

The Court did in *Linn*permit recovery of damages in a state cause of action where defamatory statements were published maliciously and caused damage to the complainant.

For the foregoing reasons the Appellants contention that the defamation actionable under the Virginia statute overstepped the limits imposed by Federal Labor Law is without merit.

## 4. APPELLANTS ASSERT THE DAMAGE AWARD WAS EXCESSIVE

In *Linn Supra* 383 U.S. at 65-66, this Court set out the items of damages that could be considered by a jury as follows:

> "We therefore hold that a complainant may not recover except upon proof of such harm, which may include general injury to reputation, consequent mental suffering, alienation of associates, specific items of pecuniary loss, or whatever form of harm would be recognized by state tort law."

It is required that the defamed party establish that he has suf-

fered some sort of compensable harm as a prerequisite to the recovery of punitive damages. Certainly by the evidence produced at the trial, the Appellees showed such compensable harm as is specifically mentioned in *Linn*. The Supreme Court of Appeals of Virginia in its opinion points out the compensable damage which was proved.

In the *Linn* case, the Government as *amicus curiae* urged this Court to go further and limit liability to "grave" defamations - those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct. This Court did not agree.

In the case at bar, the Appellees were accused of being traitors to God, country, family and class. If this Court had adopted the Government's contention, the Appellees at hand would have qualified under "grave defamations". The crime of treason in Virginia being punishable by death under Virginia Code Section 18.1-418. The Supreme Court of Virginia has held in *United Construction Workers vs. Laburnum*, 194 Va. at 895, affirmed by this Court at 347 U.S. 656, that "there is no fixed standard for measuring exemplary or punitive damages, and the amount of the award is largely a matter of discretion with the jury."

## *RESPONSE TO BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE*

The AFL-CIO "amicus curiae" brief concedes that the state courts do have jurisdiction to entertain defamation suits arising from a union campaign to organize workers.

They state further that the substantive law the states may apply in exercising jurisdiction is "limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false," citing *Linn* 383 U.S. at 60-61. Once again, mention is made of the fact that the publication conveyed to the reader the fact that the Appellees were traitors and men of such low

character and rotten principles that they should be despised by their fellow workers. These statements amounted to facts that certainly were false and were printed with utter disregard of their truity or falsity in an attempt to hold the Appellees up to ridicule in the eyes of fellow workers.

The Union would have this court believe that the libel printed of and concerning the Appellees was "rhetorical hyperbole". The Secretary of Local Branch No. 496 however, testified that he could not state whether or not the Appellees were traitors. He then stated, "Since the plaintiffs were getting the benefits of the union without joining, I think they have rotten principles". Certainly the article written concerning the Appellees and the testimony of the local union's secretary both bear out the fact that this publication consisted or more than mere "rhetorical hyperbole".

The AFL-CIO Brief asserts the trial Court did not follow *Linn*. The opinion of the trial Judge indicates full awareness of *Linn* and its doctrine. Except for the assertation that the *New York Times* rule applies and that the words were mere rhetorical hyperbole, the amicus curiae does not point out where the Court failed to follow *Linn*. While AFL-CIO amicus curiae states they are not asking a reconsideration of *Linn;* they are asking the Court to adopt standards which the Court, did not adopt in *Linn* and which would have the effect of changing the guide lines laid down in *Linn*.

## *CONCLUSION*

For the reasons set forth above the Motion To Dismiss the Appeal should be sustained.

Respectfully submitted,

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*CERTIFICATE OF SERVICE*

I hereby certify that copies of the foregoing Response and Motion To Dismiss Appeal and Response to Brief of AFL-CIO, amicus curiae have been served this 4th day of May, 1973, by first-class mail, postage prepaid, upon;

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All parties required to be served have been served in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

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